IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWEISER,
Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *AMICUS CURIAE.*

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Appellees.

ON APPEAL FROM A THREE JUDGE COURT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of this Court, the National Jewish Commission on Law and Public Affairs, by its attorneys, Julius Berman, Reuben E. Gross, Sidney Kwestel and Marcel Weber, respectfully moves this Court for leave to file the annexed brief as *amicus curiae* in support of appellees herein. Appellees have consented to the filing of this brief. Although appellants gave their consent, they have stated it was conditioned on the *amicus* brief being submitted by December 30, 1967, which is thirty days prior to the extended time which has been allowed for the filing of respondents' brief.

The National Jewish Commission on Law and Public Affairs is a voluntary association whose purpose is to represent the position of the Orthodox Jewish Community on matters of public concern. This action, brought by seven taxpayers, seeks to enjoin the continued operation of the education programs under Titles I and II of the Elementary and Secondary Education Act of 1965. The Titles under attack provide for special educational services to educationally deprived children whether they attend public or non-public schools and textbooks and library materials for all school children. Many of the children being benefited by the programs under attack attend Orthodox Jewish parochial schools located throughout the United States. Recognizing the contribution of a healthy educational system to the welfare of a democratic society, the Commission firmly supports the advancement of educational opportunity for all American children, believing that all of society benefits when programs are developed which advance the educational growth of all school children.

The Commission is familiar with the arguments advanced on both sides in this appeal, and believes that there is a need for the additional commentary contained in the attached brief *amicus curiae.*

The Commission has involved itself with this area and the relationship thereto of the Principle of Separation of Church and State and believes that its views may aid the Court in its consideration of the issues presented in this appeal. It therefore respectfully requests permission to file the attached brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *AMICUS CURIAE*

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations: **Agudath Israel of America; National Council of Young Israel; Poale Agudath Israel of America; Rabbinical Alliance of America; Torah Umesorah, The National Society of Hebrew Day Schools; and Union of Orthodox Jewish Congregations of America.**

Interest of the *Amicus Curiae*

The National Jewish Commission on Law and Public Affairs is a voluntary association whose purpose is to represent the position of the Orthodox Jewish Community on matters of public concern. The Commission is fully

committed to the preservation of constitutional rights for all Americans, particularly the Principle of Separation of Church and State, in the belief that thereby Americans of the Jewish faith, in common with all other Americans, will enjoy the blessings of liberty. Recognizing the contribution of a healthy educational system to the welfare of a democratic society, the Commission firmly supports the advancement of educational opportunity for all American children. We believe that all of society benefits when programs are developed which advance the educational growth of all school children. Accordingly, we submit this brief because the statute being challenged herein plays an important role in the continued growth and expansion of educational programs throughout the United States which are beneficial to all school children.

Statement of the Case

This is an action brought by seven taxpayers against the Secretary of Health, Education, and Welfare and the Commissioner of Education of the United States, to enjoin the continued operation of the education programs under Titles I and II of the Elementary and Secondary Education Act of 1965. The statute was overwhelmingly passed by Congress after many years of urgent pleas that the federal government take action to support elementary and secondary education throughout the country. The Titles under attack constitute two of the three major sections of the Act; they provide for special educational services to educationally deprived children whether they attend public or non-public schools and textbooks and library materials for all school children. The alleged constitutional defect asserted by appellants is that some of the services and materials which are provided under the statute are made available to the children on the premises of parochial schools. Thus, appellants contend that their First Amendment rights are infringed.

A special three-Judge District Court was convened and by a 2-1 vote dismissed the suit on the ground that the plaintiffs lacked standing to sue. An appeal was taken to this Court which noted probable jurisdiction.

Argument

The well-established restriction upon taxpayers' suits in federal courts is predicated upon wise and sound principles enunciated by this Court. This limitation, however, has not impeded persons whose constitutional rights are threatened from having access to the courts, as demonstrated by many previous decisions of this Court. Appellants have failed to advance any cogent arguments to justify any deviation from this sound and historic requirement of standing to sue.

POINT I

The Doctrine of *Frothingham* v. *Mellon* is a sound one and should be reaffirmed.

In 1923, this Court, in a unanimous decision, declared that a taxpayer, seeking to enjoin on constitutional grounds federal appropriations, lacked standing to sue because he could not prove that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923). The Court recognized that a frivolous claim of injury should not thwart the will of the Congress. As Mr. Justice Sutherland said:

> "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money and whose validity may be questioned." 262 U.S. at 487.

This principle is as valid today as it was forty-five years ago, perhaps more so because of the many new federal programs designed to improve the living conditions of millions upon millions of Americans. Of most importance is the simple fact that it has not once proved to be a barrier to those whose rights have been truly threatened. During the past generation this Court has been especially sensitive to claims of violations of those fundamental freedoms implicit in a scheme of ordered liberty. Yet, this concern has not been hindered by the Court's continued adherence to *Frothingham* v. *Mellon.*

Thus, this Court, time and time again, has had occasion to rule upon alleged violations of the Establishment and Free Exercise clauses of the First Amendment, such as, the busing of parochial school children, *Everson* v. *Board of Education,* 330 U.S. 1 (1947); release time programs, *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) and *Zorach* v. *Clauson,* 343 U.S. 306 (1952); prayers and Bible reading in public schools, *Engel* v. *Vitale,* 370 U.S. 421 (1962) and *Abington School District* v. *Schempp,* 374 U.S. 203 (1963); Sunday closing laws, *McGowan* v. *Maryland,* 366 U.S. 420 (1961); and the rights of Sabbath Observers, *Sherbert* v. *Verner,* 374 U.S. 398 (1963). These cases make it clear that if a party has a colorable claim of infringement of constitutional rights, he would have his day in court.

In contrast, the sparse complaint filed by appellants herein fails to set forth how the appellants have been injured and, most significantly, fails to state the manner in which the Establishment and Free Exercise clauses of the First Amendment have been violated.

The frivolous nature of appellants' claim of injury is manifested by the fact that they say nothing in their complaint about the challenged programs other than the bald assertion that federal funds are being "used to finance and aid, in whole or in part, instruction in reading, arith-

metic and other subjects and for guidance in sectarian or religious schools" (Complaint, Paragraph 13), and "for the purchase of textbooks and instructional and library materials for use in religious and sectarian schools" (Complaint, Paragraph 15). Not a single program in any locality is described. Surely, if the allegation of violation of constitutional rights had any merit, the appellants ought to be able to show how specific programs actually affect them. The conclusion is inescapable that the purpose of this lawsuit is not to protect the civil liberties of these taxpayers, but, rather, to broadly tarnish a major congressional enactment involving the appropriation of billions of dollars to help hard-pressed local educational systems and educationally disadvantaged children.

Were *Frothingham* v. *Mellon* overruled, it would open the door to a flood of similar frivolous attacks against all the important domestic legislation enacted by Congress. Certainly, it would be simple to draft a complaint, such as here, alleging that appropriations for the fight against poverty and indeed every program administered by the Department of Health, Education and Welfare and other federal agencies violate the constitutional rights of some taxpayers.

POINT II

Taxpayer suits against Federal Appropriations are not the appropriate way to protect First Amendment Rights.

This Court has been urged that, short of totally repudiating the doctrine of *Frothingham* v. *Mellon*, it should be limited to litigation not raising First Amendment freedoms. This argument is based on the concept that the rights enumerated in the First Amendment have been accorded a "preferred position" by this Court and are so fundamental to the preservation of a free society that courts should relax their jurisdictional requirements.

Were the Court to narrow the standing rule, as appellants urge, taxpayers who opposed federal programs would simply couch their taxpayer lawsuits in First Amendment terms. No matter what the purpose of the appropriation or the nature of the challenged program, a plaintiff will have little difficulty in claiming that at least one of his First Amendment freedoms is being curtailed. Indeed, if the argument of the appellants is accepted, every taxpayer's claim of violation of First Amendment freedoms will *ipso facto* constitute a case or controversy. Thus, as a practical matter, a rule excluding First Amendment cases from the standing requirement would be the equivalent of overruling *Frothingham* v. *Mellon*.

Moreover, by its very nature a taxpayer suit can assert no more than a claim—and, at that, a tenuous one—of economic injury. But First Amendment claims are not dollars-and-cents rights; the Amendment and the preferred position approach is designed to protect those whose substantive freedoms are being violated. The showing of some actual or potential injury to the claimant is thus at the heart of the "preferred position" approach, while the principle underlying the bar against taxpayer suits is that they do not involve any injury to the claimants, whether it be the First Amendment or otherwise.

Much has been made of recent decisions in which this Court has seemingly relaxed the standing requirement to permit judicial determination of substantive constitutional issues. These cases, however, fall directly within the "preferred position" doctrine which affords special protection to persons whose access to the political process is limited. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). In each of those suits the injury sustained by the claimant was direct and could not be redressed through ordinary political activity, thus necessitating a more permissive judicial attitude regarding the right to sue. Moreover, it is notable that in not one of these cases was the plaintiff a taxpayer.

NAACP v. *Button*, 371 U.S. 415 (1963), involved a Virginia statute aimed at stifling the NAACP's promotion through litigation of Negro rights. The law was struck down as a violation of the First Amendment freedoms of expression and association. This Court found that in Virginia, Negroes were unable to obtain a fair hearing before the state legislature and the adverse effect on the NAACP was both direct and substantial. In affirming the right of the NAACP to challenge the statute, Justice Brennan, speaking for this Court, underscored the political process factor:

> "And under the conditions of modern government, *litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*" (Emphasis supplied)
>
> • • •
>
> "For such a group, association for litigation may be the most effective form of political association." 371 U.S. at 430, 431.

Similarly, in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), there was direct injury to the NAACP by virtue of an Alabama law compelling it to disclose its membership list as a condition of continued operations within the state. This Court upheld the NAACP's claim of violation of the Negroes' freedom of association and made it clear that because there was no political opportunity to countermand the injurious legislation, the standing requirement would not bar the suit:

> "*The principle* [*of Standing*] *is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court.*" 357 U.S. at 459 (emphasis supplied)

By the same token, in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), a seller of real property to a Negro in violation of a restrictive covenant that he had signed was permitted

to rely on the Equal Protection clause of the Fourteenth Amendment as a defense against a damage claim brought by the original seller although it was the equal protection of the Negro that was being curtailed.

The recognition that state action against minority groups denies them the opportunity for effective political response was explicit in Justice Stone's formulation of the "preferred position" doctrine in *United States* v. *Carolene Products Co., supra,* when he said:

> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry." [Citations omitted] 304 U.S. at 153.

In sum, then, the cases of *NAACP* v. *Button, Barrows* v. *Jackson,* and *NAACP* v. *Alabama* heavily relied on by appellants are totally inapposite. First, they were not taxpayer suits. Second, they involved direct injury. And finally, the adversely affected parties were members of a minority group for whom it was well established that normal political activity could not be relied upon to repair the injury.

That the foregoing cases presented special circumstances for relaxing the Standing requirement was recognized by this Court in *McGowan* v. *Maryland;* 366 U.S. 420 (1961). *McGowan* involved an attack by department store employees against a state's Sunday-Closing Law as an infringement of the Establishment and Free Exercise clauses of the First Amendment. Although it was beyond question that the employees were directly affected by the statute, this Court held that they had no standing to challenge it under the free exercise clause:

> "Those persons whose religious rights are allegedly impaired by the statutes are not without effective

> ways to assert these rights. Cf. *NAACP* v. *Alabama*, 357 U.S. 449, 459-460; *Barrows* v. *Jackson*, 346 U.S. 249, 257." 366 U.S. at 430.

Nor can appellants derive any comfort from *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963) wherein this Court rejected a challenge to the standing of a book publisher whose sales were threatened by anti-obscenity legislation and permitted him to assert that the statute infringed his freedom of expression. Unlike the taxpayers in the present suit, the injury to the publisher was both direct and substantial.

Obviously, too, the injury involved in *Baker* v. *Carr*, 369 U.S. 186 (1962) was of such a nature that it could not be remedied otherwise than by court action. The plaintiff's right to vote had been diluted by the refusal of the state legislature to reapportion itself. Thus, the voters' ability to engage in meaningful political activity had been restricted and limited. In finding that the voters had standing, this Court insisted upon a direct personal interest as a precondition to the right to sue:

> "A Federal Court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." 369 U.S. at 204.

In contrast to the aggrieved parties in the foregoing cases, the parties and organizations which have instituted the present litigation have had and continue to have ample opportunity to present their views to congressional bodies

and to the public and to take whatever political action they deem desirable in order to promote their position. They have also been able to have direct contact with the local public agencies that administer the Elementary and Secondary Education Act. Retention of the sound judicial policy against taxpayer suits will not foreclose these parties from meaningful opportunity to redress the alleged wrongs.

In conclusion, in each of the above cases in which the Standing rule was relaxed, the personal stakes of the litigants were substantial and direct as compared with the frivolous economic interest asserted by the appellants in this case. As the previous decisions show, this Court has given preference to the First Amendment, both with respect to jurisdictional and substantive constitutional questions and this is at it should be when the freedoms of Americans are under attack and there are no effective political means for redress of the adverse public policy. We submit that the wise policy against taxpayer suits should not be swept aside merely because a tenuous First Amendment assertion has been made.

POINT III

There is no colorable claim of violation of First Amendment Rights.

Assuming, *arguendo,* that *Frothingham* v. *Mellon* is to be overruled or limited to non-First Amendment claims, appellants would nevertheless be required—as in all litigation—to show how their interests were threatened, directly or indirectly.

It is reasonable and necessary that when taxpayers sue to enjoin expenditures, they show a direct nexus between the expenditures and the alleged violation of their constitutional freedoms. This the appellants have not even begun to do in this case, even if one accepts—which we do not—the flimsy allegations contained in the complaint.

We may safely assume that the sparseness of the complaint does not result from appellants' unwillingness to disclose information that would lend substance to the allegation that their rights are being infringed. There is no clear statement in the complaint as to how the funds spent to implement the challenged provisions of the federal aid to education law deprive the plaintiffs of *their* constitutional rights. Indeed, they explicitly concede that the programs under attack would be valid if conducted on the premises of public schools (Complaint, Paragraphs 9-11).

The less than tenuous link between expenditure of public funds and infringement of First Amendment freedoms is plainly exposed in the assertion that the free exercise of religion of the plaintiffs has been violated. Not a shred of evidence is presented to show that, directly or indirectly, patently or subtly, the appellants or anyone else are in the slightest way precluded from practicing their religion or coerced toward accepting a creed that is not their own by any program under the Elementary and Secondary Education Act. And of even greater importance is the blatant absence from the complaint of the incontrovertible facts with respect to the operation of the statute without which it is manifestly impossible to reach any substantive constitutional questions.

The programs being challenged here are clearly secular in their purpose and completely non-coercive; their primary —and secondary—effect is neither the advancement of religion nor its inhibition. The only recipients of funds under the Elementary and Secondary Education Act are local public school boards. Also left out is the fact that the purpose of the statute is to provide funds for special educational services in poverty areas where Congress has found that children receive a substandard education; that the funds available under the Act may not be used for religious worship or instruction; that the only programs for children attending non-public schools which may be

supported by Title I funds are those that are not already offered by the local schools; that it is the responsibility of the local public school boards to decide whether any particular program will be conducted in the schools the disadvantaged children regularly attend or at some other location; that it is the local public school authorities who hire teachers, establish curricula, and make every decision regarding implementation of the programs supported by the Act; that with respect to Title II, materials may be purchased only by a public school board; and that children are allowed only the use of the materials, which must be accounted for to the local public school board.

The complaint contains no allegations at odds with any of these omitted facts; it does allege that the appropriations under the Act "constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion" (Complaint, Paragraph 16). But the omitted facts highlight the completely public purpose of the challenged programs.

The sole claim of constitutional injury to the appellants arises from the use of certain parochial school facilities which are regularly used by the educationally deprived school children who are the beneficiaries of public assistance. But how does the physical location of the place where the programs are held adversely affect the religious freedoms of the plaintiffs? The plaintiffs attempt to answer this trenchant question in the following *pro forma* allegations of their complaint:

> "The determination and action of the defendants violate the First Amendment to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion.

> "The determination and action of the defendants violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes." (Complaint, Paragraphs 16, 17)

No explanation whatever is offered for their bald conclusion that their constitutional rights have been violated. To be sure, appellants believe that federal moneys are being spent on unconstitutional programs. Such a claim was squarely rejected by this Court in *McGowan* v. *Maryland, supra*:

> "But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities,' *United States* v. *Raines*, 362 U.S. 17, 22, we hold that appellants have no standing to raise this contention." 366 U.S. at 429.

Certainly, the interest of the plaintiff department store employees in *McGowan* was far more direct and substantial than that of the plaintiffs here.

It is manifest that to substantiate a free exercise claim, a showing of coercion by government is required. As Justice Clark said for a majority of this Court in *Abington School District* v. *Schempp, supra*:

> "The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 374 U.S. at 222-23.

There is not even a hint in this complaint as to how the statute and practices under attack compel the plaintiffs in their religious practices.

Furthermore, there is also no colorable claim of violation of the Establishment clause. To be sure, this Court noted in *Abington School District* v. *Schempp, supra,* that "the requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that particular religious freedoms are infringed." 374 U.S. at 224, footnote 9. But the Court went on to find that the parties challenging the statute were "directly affected."

> "The parties here are school children and their parents, *who are directly affected by the laws and practices against which their complaints are directed.* These interests surely suffice to give the parties standing to complain." *Ibid.* (Emphasis supplied)

The parties here have totally failed to demonstrate a comparable interest in the statute and programs here under challenge.

Similarly, the test suggested by Justice Brennan in his concurring opinion in *Schempp* that Standing under the Establishment clause should be allowed to persons who "set at least a colorable claim of infringement of free exercise." (374 U.S. at 266, footnote 30) compels dismissal of the complaint here. Since, as we have seen, there is no colorable claim here of violation of the free exercise of religion, there is necessarily no colorable claim of violation of the establishment clause.

Nor do the plaintiffs meet the Standing test of *Baker* v. *Carr, supra,* briefly discussed previously in another connection:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseriness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions? This is the gist of Standing."

The Complaint does not set forth any "personal stake" of the appellants here other than the allegation that tax money is being spent on programs which they regard to be unconstitutional.

From the foregoing discussion, it is clear that, irrespective of *Frothingham* v. *Mellon,* the appellants have no standing to attack the federal aid to education statute. They have failed to show some adverse coercive effect as a result of the appropriation—the necessary predicate for a claim of violation of the free exercise of religion clause. By the same token, they have not shown the necessary basis for a claim of violation of the establishment clause—(1) they are not parents; (2) they do not allege a colorable claim of violation of their free exercise rights; and (3) they have failed to demonstrate a personal stake in the outcome of the litigation. In short, even the formal overruling or limitation of *Frothingham* v. *Mellon* would not give these taxpayers standing to sue to invalidate the challenged programs.

Thus, apart from the precedential barrier against taxpayer suits, the plaintiffs in this case have not presented a colorable claim of violation of their First Amendment rights sufficient to establish that a "case or controversy" exists.

POINT IV

The statute under attack promotes society's interest in providing quality education for all children.

We have demonstrated that the taxpayer-plaintiffs have failed to allege even a colorable claim of injury. On the other hand, the interest of government and society in promoting adequate educational opportunities for all school children is of major magnitude. As this Court declared in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954):

> "Today, education is perhaps the most important function of state and local governments. Compulsory

school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."

When these words were written the federal government played virtually no role in supporting education at the elementary and secondary school levels. Increasingly, however, it became evident that federal involvement at these levels was necessary. Despite increased expenditures, state and local governments have been unable to provide enough money to properly finance education. At the same time, it became apparent that schools throughout the country—both public and non-public—were not providing many school children with the special needs vital to their education.

The education program presented by President Johnson to Congress in early 1965 was designed to meet and remedy these serious problems. The proposed legislation, which was drafted after consultation with leading public education authorities who gave it their enthusiastic support, met with the approval of virtually every group concerned with education that testified before congressional committees. In a special message to Congress on January 12, 1965, President Johnson pointed out:

"One hundred years ago, a man with 6 or 7 years of schooling stood well above the average. His chances to get ahead were as good as the next man's. But today, lack of formal education is likely to mean low wages, frequent unemployment, and a home in an urban or rural slum.

"Poverty has many roots but the taproot is ignorance.

"Poverty is the lot of two-thirds of the families in which the family head has had 8 years or less of schooling.

"Twenty percent of the youth aged 18 to 24 with an eighth-grade education or less are unemployed—four times the national average.

"Just as ignorance breeds poverty, poverty all too often breeds ignorance in the next generation.

"Nearly half the youths rejected by Selective Service for educational deficiency have fathers who are unemployed or else working in unskilled and low-income jobs.

"Fathers of more than one-half of the draft rejectees did not complete the eighth grade.

"The burden on the Nation's schools is not evenly distributed. Low-income families are heavily concentrated in particular urban neighborhoods or rural areas. Faced with the largest educational needs, many of these school districts have inadequate financial resources." 111 Cong. Rec. 492, 500.

Congress responded to the situation by giving overwhelming approval to the Elementary and Secondary Education Act of 1965. It is this law which is under attack in this litigation.

As previously described, the allegedly unconstitutional programs are, in all respects, administered by public officials and no money goes to support, directly or indirectly, religious instruction or worship. But in addition to being under public control, the provided services are completely public in nature and have nothing to do with the regular educational programs conducted by parochial schools.

These services do not assist any church or sectarian institution. They help students in elementary and secondary schools, including those who attend parochial schools; they also are to the benefit of all of society.

Elementary and secondary education is the responsibility of government; the constitution of every one of the fifty states guarantees a free public education to the children of school age within the state. In fulfillment of this responsibility, public school systems are established and compulsory attendance laws are passed.

But government must do more than merely insure school attendance for all; the concept of public responsibility includes the obligation to provide quality education, in order to insure that the students develop their fullest potential and thereby maximize their contribution to society.

Education is a public responsibility of the first order. Children may receive their necessary secular instruction either at public or non-public schools. In such event, both of these school systems—public and non-public—provide a most meaningful public (or governmental) service. The non-public schools are entrusted with what today is perhaps the most crucial job of society, and, in doing this job, they are as legitimate as the schools operated and financed by the state. Their very existence, educational performance and utility provide the most cogent response to those who allege that parochial schools are church institutions, pure and simple. As Walter Lippman once put it, "A parochial school is an American school."

In much the same way that the governmental function with respect to public schools entails not only the fact of school attendance but also the quality of education of public school children, the government also has the responsibility of insuring that students who go to parochial schools receive quality instruction. The government must assure that the educational needs of parochial school children are properly satisfied. Accordingly, the educational standards established govern all schools; and the Doctrine of Separation of Church and State poses no barrier to the adoption of laws and regulations relating to the quality of education in the non-public schools. Thus, standards have been set regulating attendance, subjects taught, and length of the school day in parochial schools. By the same token, separation of church and state should not serve to obstruct the state's recognition of its responsibilities to parochial school children who are in need of special educational services. Remedial programs are indispensable concomitants of quality education, for which the state is responsible, whether children attend public or non-public schools; remedial programs are the state's guarantee that children with special needs and problems will be assisted toward becoming useful citizens in our complex and dynamic society. The services provided under the Elementary and Secondary Edueation Act of 1965 are designed to accomplish this end.

If we examine for a moment two of the educational programs that are challenged as unconstitutional when given to parochial school children at their regular school premises—remedial reading and psychological counseling—the substantial educational interest of society becomes apparent. Religion does not benefit when children are taught to read properly and are given guidance which helps them to solve their problems, but society does. These programs and the others that are being attacked here have nothing to do with sectarian instruction; their impact on parochial school attendance, if there is any, is much smaller than that of busing programs upheld by this Court in *Everson* v. *Board of Education, supra.* In the case of busing, public funds are being used to bring children to a place where they receive religious instruction and perhaps without the busing some children would not be able to attend the parochial school. Here the programs are completely secular in their conception, function, content, and administration. Their major impact is on children and on the society which to its own benefit recognizes its responsibility to guarantee quality instruction to all.

The social gains to be achieved as a result of the programs set up under the Elementary and Secondary Education Act, can be appreciated most clearly when applied to a particular educational institution which is eligible for assistance under the statute. The Beth Rachel School is the girls' division of the United Talmudical Academy, the largest Jewish day school in this country. It is located in Brooklyn, New York and, as a recent memorandum by the Principal of its general studies program indicates, society has a valid interest in providing special services to its students:

> "At present, our school population is 1500 girls, kindergarten thru high school. Most of our children come from low-income families. The average family has 5.9 children. The families reside in the poverty areas of Williamsburgh and Crown Heights. Ten per cent of our enrollees consist of students who

have arrived in the United States within the last few years from overseas, most of them coming from Hungary, Israel, and South America. These children pose a special problem to our school. Under our present setup, we are not equipped to provide special classes or tutoring services to these immigrants and they must be placed in regular classes. In some cases, it may result that a twelve year old girl has to be placed in a second or third grade.

"To most of our children, English is a second language since they come from Yiddish-speaking homes and a Yiddish social environment. Many of our children are two or more years behind in reading and language. This causes a severe handicap in their educational development."

(Rabbi Hertz Frankel, Memorandum of December 6, 1967 to the National Jewish Commission on Law and Public Affairs.)

But it is argued that the needy children should go to the public school for the remedial assistance, that it is the use of parochial school facilities which taints the programs. The Beth Rachel School is one of the most eligible non-public schools in the entire nation for Title I assistance, yet for the entire 1966-1967 school year, these were the special services given on parochial school premises to the girls who needed help:

One remedial reading teacher—two days a week
One remedial math teacher—three days a week
One speech therapist—one day a week

For this school year, the following services are provided:

One remedial reading teacher—two days a week
One speech therapist—one-and-a-half days a week
One teacher for non-English speaking students —three days a week

It would defeat the entire concept of the Elementary and Secondary Act and negate the state's obligation to children who are in need of remedial services, if all remedial progams had to take place at the public school. In some areas there might not be public schools close to the schools attended by these children. In other cases, for one reason or another, parents would be unwilling to have their children go to the public school for a remedial program. But most importantly, for children who do need help, the best place to provide it is often the school where these children feel most comfortable. Remedial programs are likely to be most efficacious and economical when they do not require school children with educational problems to be walked or bused to another school.

Surely, a parochial school building may be used for the performance of a valid public function when public control is maintained, as it is in this case. Where society benefits and there is no support whatsoever of religious instruction—such as with respect to medical and dental programs provided on parochial school premises—there can be no objection to the use of a building merely because it also serves a sectarian function.

We submit that in view of the overriding public interest in guaranteeing proper educational opportunities for educationally deprived children, this Court should not permit individuals who are not injured to obstruct the operations of the Elementary and Secondary Education Act which is designed to promote this interest.

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